United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig. w/ affidavit of mailing

75-1250

To be argued by
JOHN L. CADEN

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P/S
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1250

UNITED STATES OF AMERICA,
Appellee,

—against—

WILLIAM MOORE and RICHARD THRASHER,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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ALVIN A. SCHALL,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR THE APPELLEE

Preliminary Statement

William "BI" Moore and Richard Thrasher appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) on May 2, 1975, after a jury trial which judgments convicted them (under superseding indictment 73 Cr. 600) of a conspiracy (Count One) to conceal, poss s and distribute large quantities of heroin hydrochloride between June 1970 and January 1973, in violation of Title 21, United States Code, Sections 173, 174 and 846. Additionally, appellant Thrasher was convicted of one count (Count Three) of receiving, concealing, and facilitating the sale of approximately 150.4 grams of heroin (along with co-defendant Robert Ray Daniels) on April 9, 1971, in violation of Title 21, United States Code, Sections 173 and 174. Appellant Moore was sentenced to ten years. Appellant Thrasher was sentenced to ten years on Counts 1 and 3, to run concurrently, plus

a fine of $10,000 on Count 1. Both appellants are free on bail pending appeal.

Named as defendants in the indictment along with appellants were Frank Matthews, Billy Austin, John Bryant, Alvin Cooper, Robert Ray Daniels, also known as "Dutch Schultz", Harriet Evans, also known as "Harriet Clark", Joseph Fernandez, also known as "Slim", Walter Gilmore, Gattis Hinton, Bonnie McCallum, Gerald Mims, also known as "Pop", Joseph Polite, also known as "Junior", Larry Stewart and Clinton White, also known as "Angel". Also named in the indictment was Donald James as an unindicted, co-conspirator. James was the principal government witness at trial.[1]

On April 14, 1975, a jury was selected, along with two alternates. The trial commenced as to all defendants named in the indictment with the exception of Gattis Hinton and Frank Matthews who were fugitives.[2] On April 16, 1975, shortly after the trial had begun, the court excused juror #6, at her request and without objection of counsel, because her cousin (with whom she was close) was employed by a realtor who was an uncle of

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[1] James and his paramour Nancy Marbury testified as government witnesses at appellants' trial under a grant of immunity from prosecution for their participation in the conspiracy and acts charged in the instant case (73 Cr. 600). Prior to appellant's trial on February 20, 1975, James pleaded guilty before Judge John F. Dooling, Jr., of the United States District Court for the Eastern District of New York to Count 8 of indictment 72 Cr. 242 charging him with distributing approximately 150.4 grams of heroin hydrochloride on April 9, 1971. On April 1, 1975 (still prior to appellants' trial), James was sentenced to 5 years pursuant to Title 18, United States Code, Section 4208(a)(2). After sentencing, on motion of the United States Attorney, the court dismissed the remaining 7 counts of the indictment against James.

[2] Defendants Frank Matthews and Gattis Hinton have been and remain fugitives since the original indictment (73 Cr. 101) was filed on January 26, 1973.

the defendant-fugitive Frank Matthews (240).[3] Then, on April 21, 1975, the court excused juror #11 because of a heart attack suffered during the course of the trial (594).

Finally, on April 28, two weeks into the trial, the court was compelled to excuse juror #1, because she suffered severe mental depression requiring hospitalization (1699). Juror #1's illness resulted in a jury of eleven. Since only appellants and Billy Austin waived the jury of twelve and complied with the requirement of Rule 23(b) of the Federal Rules of Criminal Procedure, Judge Mishler declared a mistrial as to all other defendants and directed that their trial commence immediately after the completion of appellants' and Austin's trial.

On May 2, 1975, appellants were found guilty. When the jury was unable to reach a verdict as to defendant Austin, however, Judge Mishler declared a mistrial as to him and ordered a retrial of Austin and the remaining defendants on May 5, 1975. On May 6, 1975, defendant Austin pled guilty as described in the addendum to this brief which shows, in addition, in tabular form, the resultant convictions of all the non-fugitive defendants following their pleas of guilty.

On this appeal, appellant Moore does not challenge the sufficiency of the evidence against him, but instead argues that the trial judge committed reversible error when he refused to permit Moore's counsel to cross examine Government witness Donald James as to "details" of James' extra marital sexual relationships.[4]

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[3] All references are to the trial transcript unless otherwise indicated.

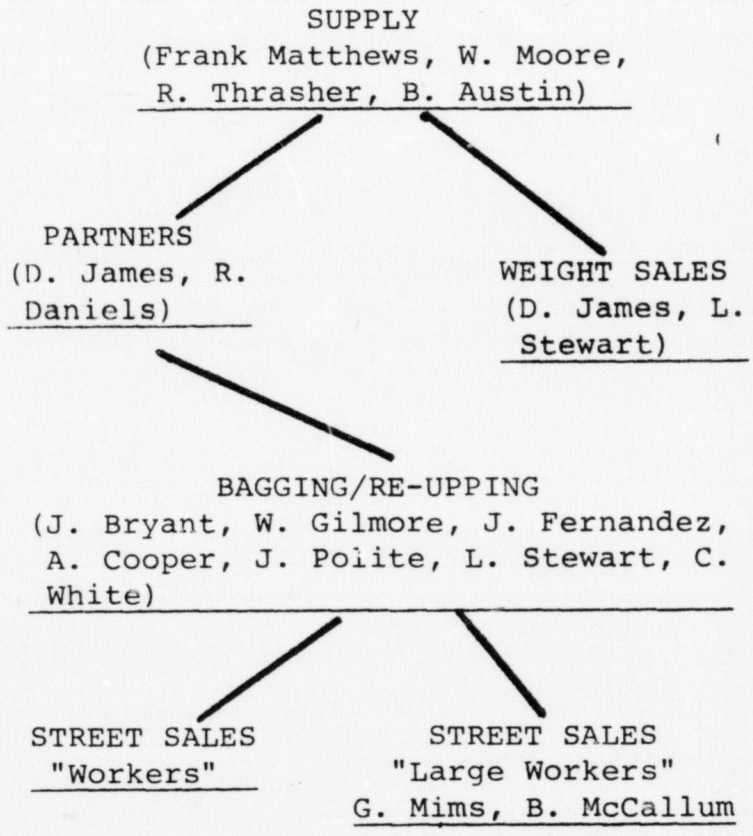
[4] Counsel for Richard Thrasher has moved to withdraw as counsel and has filed an *Anders* v. *California*, 386 U.S. 738 (1967) memorandum. On the basis of that memorandum, we have moved to dismiss the appeal of Thrasher.

Statement of Facts

A. The Conspiracy In Outline: The Donald James-Robert Ray Daniels "Organization"

The Government's case consisted primarily of (1) the testimony of the two unindicted co-conspirators, Donald James, who was also known as "Keno", and Nancy Marbury (also known as "Nancy Cunningham"); (2) Forty-three wiretapped telephone conversations, including those of several defendants other than appellants (e.g., John Bryant and Walter Gilmore); (3) seven note books reflecting the conspiracy's narcotics trafficking which were maintained and kept up to date by Donald James and defendants Robert Ray "Dutch" Daniels, Alvin Cooper and Harriet Evans; as well as (4) quantities of heroin purchased by federal undercover agents from Donald James in January and April of 1971. Taken together, this evidence showed that Donald James and defendant Robert Ray Daniels operated a multi-million dollar heroin business in the Brownsville, Bedford-Stuyvesant, and East New York sections of Brooklyn between June 1970 and January 1973.

The structure and modus operandi of the Donald James-Robert Ray Daniels' heroin organization can be shown as follows:



James and Daniels purchased large quantities of heroin (ranging approximately from 1/2 kilo to as many as 10 kilos at any time) from four suppliers: appellants Thrasher and Moore and Billy Austin and Frank Matthews. Following its purchase, the heroin was tested to determine its strength. Later, it was brought to a location, called a "bag-up", where it was "cut", that is, diluted with quinine or benita, spooned into thousands of tiny glassine envelopes and bundled (146-151). James and Marbury testified to fifteen (15) specific apartment buildings in Brooklyn where these "bag-ups" were held. Often a "bag-up" would last a week or more with most of the work being done primarily at night (152-55).

After the narcotics were prepared for the street and bagged, individual defendants (John Bryant, Alvin Cooper, Joseph Fernandez, a/k/a "Slim", Walter Gilmore, a/k/a "Hamburger", Larry Stewart, Clinton White, a/k/a "Angel" and Joseph Polite, a/k/a "Junior") who were referred to in the organization as "lieutenants", delivered the heroin bundles on consignment to persons called "workers", the actual heroin pushers, at locations in the streets of Brooklyn called "re-ups" (resupply) spots (155-161). The "workers" called the James-Daniels organization daily at telephone numbers provided to them by the lieutenants. When a "worker" called, the person who answered the phone gave the worker a street location where the "worker" would be resupplied ("re-upped") by the lieutenants. The small lieutenants resupplied ("re-upped") the workers on a daily basis at all times of the day and evening (180-82).[5] Additionally, in the course

[5] James testified to eight specific re-up locations. The forty-three recorded telephone conversations introduced at trial were intercepted in the course of the execution, between August 30, 1971 and September 13, 1971, of a court-ordered state wiretap on the telephone at one of these locations, an apartment at 408 Amboy Street, Brooklyn, New York owned by Carol and Charlie Brown. On appeal, appellants do not challenge the validity of these wiretaps.

of their duties, the "lieutenants" attended "bag-ups and collected narcotics monies from the "workers". When the workers failed to pay what they owed, the "lieutenants" assaulted them (466-73).

James testified that between June through October 1971, his business grossed approximately $280,000 per week. Most of the money came from the "bundle" business. During this same period the James-Daniels organization supplied over a hundred workers daily with anywhere from two to one hundred bundles. The defendants Gerald Mims and his girlfriend defendant Bonnie McCullum, working together during this time, received a hundred bundles of heroin every day. For obvious reasons, James and Daniels referred to them as "large workers" (476-98).

In order to keep track of business, James and Daniels kept records of the names of their workers, addresses, bundles received and monies owed by the workers (182-83). At trial, these records were received into evidence as Government Exhibits #8, 10, 11, 12, 13, 14 and 15.

In addition to selling heroin in bundles, James and Daniels sold heroin by "weight"—that is, in amounts of one ounce or more. In January 1971, in Brooklyn, James and defendant—"lieutenant" Larry Stewart sold undercover agent Kenneth Bernhardt an ounce of almost pure heroin (99%) for $1,200. In April 1971, again in Brooklyn, James sold 1/8th of a kilogram of heroin to Bernhardt for $4,000. On both these occasions, James and Daniels treated these heroin sales as part of their drug business (573).

B. Appellants Thrasher's and Moore's Roles in the Conspiracy/Suppliers of Heroin to the James-Daniels "Organization"

(1) Appellant Richard Thrasher:

At trial, Donald James testified that he had known Richard Thrasher since 1958 (579). During 1971 James purchased a total of approximately seven kilograms of heroin from Thrasher (604). When James bought heroin from Thrasher, he called or visited Thrasher's home at 715 St. Mark's Avenue in Brooklyn where he would speak to either Thrasher or a woman named Miss Elroy (580). On the evening of April 8 and the early morning of April 9, 1971, James attempted to contact Thrasher for the purpose of obtaining 1/8th of a kilogram of heroin. Finally, on April 9, 1971, after contacting Thrasher by phone, James met Thrasher at Brownie's Bar in Brooklyn, where, in the men's room, Thrasher gave James 1/8th of a kilogram of heroin (601, 961). Later that same day, James sold that same 1/8th of a kilogram of heroin to undercover agent Bernhardt.

James also testified that Thrasher recommended an apartment (belonging to a man named Ralph at 1208 Bergen Street in Brooklyn) to him and Daniels for purposes of a "bag-up". Based upon Thrasher's recommendation, Daniels and James used Ralph's apartment for a "bag-up".

Additionally, Nancy Marbury testified that Richard Thrasher appeared at a "bag-up" she was working at on Legion Street in Brooklyn, in June or July 1971. Marbury recalled that on that occasion Daniels complained to Thrasher about the poor quality of heroin that Thrasher had supplied for the "bag-up" (1396).

(2) Appellant William "Bl" Moore:

Donald James testified that defendant-fugitive Frank Matthews and appellant Moore were major suppliers of heroin to the James-Daniels organization in 1970 and 1971.[6] On approximately twenty different occasions, at various locations in Brooklyn, Moore supplied James with a total of approximately 50 kilograms of heroin in quantities ranging anywhere from 1/2 of a kilo to 3 1/2 kilos (521-622; 1011; 1073).

James testified that the first time Moore delivered a "package" of heroin to him was at two A.M. in the morning on Montgomery Street between Rogers and Bedford Avenues in Brooklyn. James drove to that location, parked his car and shortly thereafter, Moore drove up and parked his car. James got out of his car, crossed the street and met Moore where Moore gave James the "package" of heroin (1133-38).

James testified that on other occasions when he met Moore in Brooklyn, Moore threw the packages of heroin into James' car as James drove by (1138-39; 1156).

James testified to having personally received "packages" of heroin from Moore at McKeever Place between Sullivan and Empire Boulevard, on Carroll Street, and on Quincy Street between Nostrand and Bedford Avenues (622; 1141-42), all in Brooklyn. On several occasions, when he met Moore, James was accompanied by his girlfriend Nancy Marbury (1143-44).

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[6] From November 1970 through October 1971, defendant-fugitive Frank Matthews and his associate, defendant-fugitive Gattis Hinton, on approximately thirty different occasions, delivered to Donald James a total of approximately 100 kilograms of heroin (ranging anywhere from a ½ of a kilo up to as many as 10 kilos at any one time) (606-20).

James testified that between June 1970 and February 1971, defendant Billy Austin, on several different occasions, supplied the James-Daniels organization with a total of approximately seven kilograms of heroin (622-24).

Nancy Marbury testified that around January 1971 she recalled Moore getting out of a Mercury Cougar automobile, walking across the street, and handling Donald James a shopping bag containing heroin. This occurred early in the morning on Montgomery Street in Brooklyn (1531-35; 1535-40). Marbury also testified that she saw Moore at a "bag-up" on either Underhill or Vanderbilt Avenues in 1971 (1320-21; 1396).

ARGUMENT

Judge Mishler properly limited the cross-examination of Donald James

Appellant Moore claims that Judge Mishler committed reversible error when he refused to permit appellant's counsel to cross-examine Government witness Donald James on the "details" of James' extra marital sexual relationships. Appellant argues that, under the circumstances, such cross-examination would have demonstrated James' motive to falsify. Judge Mishler ruled that such questioning was irrelevant to James' credibility and refused to allow it.

The pertinent portions of the trial record appear at pages 1118 through 1133 of the transcript. In essence, it is appellant's position that cross-examination of James was improperly limited when Judge Mishler, on objection of Government counsel, refused to allow appellant's counsel to question James on the details of his relationships with women with whom he was sexually intimate. Appellant argues that such testimony was not offered to "spread the details of James' extra marital adventures before the jury" but rather was offered to show that James' insecurity in his own masculinity had reached the point where he could only establish "relationships" with women to whom he supplied drugs. Therefore, so the argument

goes, when on one occasion appellant publicly called James a "girl" and a "faggot", James thereby came to hate appellant, and there was thus established a motive to give false testimony against appellant (see Appellant's Brief, p. 9).

Judge Mishler found the "psychoanalytical" theory of appellant's counsel interesting but irrelevant. He did, however, permit counsel to establish before the jury that appellant had, in fact, called James a "girl" and a "faggot". When asked about the incident on cross-examination, James admitted that "it could have happened." Although appellant's counsel represented to the Court that he was prepared to "prove" that appellant, in fact, had called James a "girl" and a "faggot", counsel was content to merely argue to the jury that the incident had actually happened, absent any further proof.

In the Second Circuit, certain well established rules govern the permitted scope of cross-examination aimed at revealing motive, interest and bias.

Generally, defense counsel is to be given wide latitude in questioning a Government witness, when the purpose of the questioning is to show possible motives for testifying falsely. *United States* v. *Lester*, 248 F.2d 329, 334-335 (2d Cir. 1957); *United States* v. *Wolfson*, 437 F.2d 862, 874-875 (2d Cir. 1970). Ultimately, however, it is for the trial judge, in the exercise of his sound discretion, to determine the proper limits of cross-examination. *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975).

The trial court's determination in each case must, of course, be based upon the particular facts involved. Nevertheless, it is clear that there are certain standards which

are to be applied in ruling on the proper extent of the cross-examination. In the first place, the circumstances about which defense counsel seeks to question the witness should, "as tested by experience of human nature," have "some clearly apparent force" in causing the alleged interest or bias or motive to lie. 3A Wigmore on Evidence, §949 at 784 (Chadbourne rev. 1970). Or, put another way, the facts or circumstances sought to be explored should not be too remote in terms of their effect on the witness' motives. *Id.* What is important is what is in the mind of the witness, *United States* v. *Campbell*, 426 F.2d 547, 549 (2d Cir. 1970), and what effect a particular event or circumstance could be expected to have on his thinking and motives. *Gordon* v. *United States*, 344 U.S. 414, 422 (1953). Within the above framework, a general standard is applied for judging whether or not a trial court has properly limited the scope of cross-examination. In *United States* v. *Lipton*, 467 F.2d 1161 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973), the Court quoted with approval the words of Judge Hays in *United States* v. *Campbell*, *supra*:

> In determining whether the trial judge has abused his discretion in limiting the introduction of such [impeaching] evidence, the issue is whether the jury was otherwise in possession of sufficient information concerning formative events to make a "discriminating appraisal" of a witness' motives and bias. 467 F.2d at 1166.

Donald James was on the witness stand, in this case, for five days (April 15, 17, 21, 23 and 24), his trial testimony comprising over 1300 pages of transcript. Moreover, he was exhaustively cross-examined by thirteen defense lawyers, including appellant's counsel, for over two days. Furthermore, defense counsels' cross-examinations of James were unencumbered by any substantial restrictions imposed by Judge Mishler. In the course of both

direct and cross-examination, James admitted to six prior felony convictions and one misdemeanor conviction.[7] Additionally, James admitted that between April 1973 and April 1975, he received approximately $14,000 from the United States Government while he was in federal custody (witness security program) (92-93). James further admitted that he had been dealing in cocaine and heroin since 1967. In addition, he testified to "testing" heroin on addicts, assaulting the "workers" on numerous occasions and to a love affair with drug addict Nancy Marbury while still married to his wife, Rose (143-5, 466-73, 447-48). James also testified that he had given a quantity of heroin to a female friend by the name of Carol Styles as a favor. Cross-examination elicited from James minute details as to agreements which he made with both local (New York) and federal prosecutors in exchange for his cooperation and trial testimony. Further, James was vigorously cross-examined on the disposition of his narcotics profits as well as letters which he wrote to former U.S. Attorney Robert A. Morse and several of his assistants (1064-67, 1583-98).

Contrary to appellant's contentions, the record in this case clearly demonstrates that the jury had before it a wealth of information on the basis of which it could evaluate James' credibility and determine his motives and bias. Not only were the jurors made aware of James' criminal background and his agreement with the Government, but they were also well-apprised of his insecurity, his sexual promiscuity and his callous and hardened character (as evidenced by his participation in beatings of "workers"). In short, the jury had more than "ample

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[7] James' felony convictions included the following offenses: Impairing the morals of a minor, attempted grand larceny, attempted petit larceny, possession of a forged driver's license, possession of heroin and narcotics paraphernalia (State case), and a sale of heroin to a federal undercover agent. The misdemeanor was for statutory rape (80-86).

evidence with which to support [appellant's] proposition that [James] was a vicious criminal with every motive to inculpate [appellant]" *United States* v. *Pacelli*, slip op. 5087, 5091 (2d Cir., July 24, 1975).

Indeed, by refusing to permit cross-examination on the details of Donald James' extra marital sexual encounters, Judge Mishler struck the proper balance between allowing appellant to establish James' motives and bias and preventing the trial from becoming sidetracked on remote and collateral issues. Grounded in what can only be described as the most tenuous kind of reasoning, the cross-examination sought by counsel would have furnished the jury with little, if anything, it did not already have. Just as importantly, it would have constituted nothing more than a "diversionary foray . . . into extraneous matters." *United States* v. *Pacelli*, *supra* at 5091. See also *United States* v. *Dorfman*, 470 F.2d 246 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973); *United States* v. *Kahn*, *supra*.[8]

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[8] The numerous decisions which deal with limiting the scope of cross-examination all, necessarily, turn on their particular facts. The following cases, however, present instances where testimony aimed at showing bias and motive was held properly excluded: *United States* v. *Conrad*, 448 F.2d 271 (9th Cir. 1971) (excluded was information that accomplices who testified against a co-conspirator had been arrested, but not indicted, on charges arising prior to the date of the alleged conspiracy); *United States* v. *Marks*, 368 F.2d 566 (2d Cir. 1966), *cert. denied*, 386 U.S. 933 (1967) (after it was established that bribed revenue agents were testifying for the Government in hopes of leniency, it was proper to prohibit cross-examination by the defendant in a bribery case as to other instances of bribery by the agents); *United States* v. *Miles*, 480 F.2d 1215 (2d Cir.), *cert. denied*, 414 U.S. 1008 (1973) (defendant prohibited from exploring the facts underlying departmental charges pending against a police officer who testified against him for the Government, where the fact of the charges and the witness' hopes for leniency had already been established).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: October 14, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOHN L. CADEN,
ALVIN A. SCHALL,
Assistant United States Attorneys,
Of Counsel.

ADDENDUM

Defendant	*Plea*	*Sentence*
John Bryant	Guilty/2 counts	4 yrs., 5 yrs. probation
Joseph Fernandez	under 21 U.S.C.	4 yrs.
Walter Gilmore	§ 843(b)	4 yrs.
Gerald Mims		8 yrs. and $60,000
Larry Stewart	Guilty/2 counts 21 U.S.C. § 843(b)	4 yrs.
Joseph White	Guilty/1 count under 21 U.S.C. § 843(b)	4 yrs.
Alvin Cooper	Guilty/1 count under 21 U.S.C. § 843(b)	4 yrs.
Clinton White	Guilty/1 count under 21 U.S.C. § 843(b)	4 yrs.
Harriet Evans	Guilty/1 count under 21 U.S.C. § 843(b)	4 yrs.
Bonnie McCallum	Guilty/1 count under 21 U.S.C. § 844	Imposition of sentence susp., probation for 3 years
Billy Austin	Guilty/4 counts under 21 U.S.C. § 844	3 yrs., 3 yrs. probation $5,000
Ray Daniels	Guilty/1 count under 21 U.S.C. § 841(a)(1)	15 yrs. $25,000

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 14th day of October, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Ivan S. Fisher, Esq.
401 Broadway
New York, N.Y. 10013

Stanley Schimmel, Esq.
32 Court Street
Brooklyn, N.Y. 11201

Evelyn Cohen

Sworn to before me this
14th day of October, 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

: NOTICE that the within
for settlement and signa-
of the United States Dis-
office at the U. S. Court-
an Plaza East, Brooklyn,
____ day of _____,
'clock in the forenoon.

New York,
_____, 19____

_____
ates Attorney,
for _____

_____
_____
_____
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E NOTICE that the within
_____ duly entered
_ day of _____
in the office of the Clerk of
Court for the Eastern Dis-
k,
, New York,
_____, 19____
_____
States Attorney,
for _____

_____
_____
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_____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____ is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355

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